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CURRENT CONFLICTS BETWEEN THE COMMERCE CLAUSE AND STATE POLICE POWER 1922-1927 [1]

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THERE are those who say that constitutional law is nothing but the interpretation of a written instrument. If this is true, what is to follow is a report of recent judicial exegesis of the meaning of the constitutional statements that: "The Congress shall have power . . . To Regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," and that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The power to regulate interstate commerce[2] is given to Congress and is not expressly prohibited to the states. The power to regulate intrastate commerce or business that is not commerce is not in terms given to Congress. Since it is not prohibited to the states, it is reserved to them. In so far as the decisions to be catalogued contain the conclusion that the subject-matter involved is not

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[1]This is a review of Supreme Court decisions during the October Terms of 1922, 1923, 1924, 1925, and 1926, extending from October, 1922, to June, 1927. In the footnotes are gathered references to articles and notes in legal periodicals during the same period. Discussions concerned primarily with the cases reviewed in the text follow the footnote citation without further indication of the subject matter. For similar treatment of Supreme Court decisions on commerce-clause restrictions on state police power from 1910 to 1922, see 21 Colum. L. Rev. 737-756; 22 Colum. L. Rev. 28-49; 12 Am. Pol. Sci. Rev. 33-48; 13 Am. Pol. Sci. Rev. 56-60; 13 Am. Pol. Sci. Rev. 615-618; 19 Mich. L. Rev. 26-30; 20 Mich. L. Rev. 140-143; and 21 Mich. L. Rev. 191-195.

[2]When the term "interstate commerce" is here used, it is to be understood as applying equally to foreign commerce. When the term "commerce" is used without modifying adjective, it is to be understood as referring to foreign and interstate commerce, unless the context indicates otherwise. No case on commerce with the Indian Tribes was decided during the quinquennium under review.

interstate commerce or not commerce at all, we may without excess of fancy say that the Court is giving us an interpretation of the meaning of words in the constitution. When, however, we come to decisions which allow or forbid the states to lay a restraining hand on interstate commerce, we enter a realm where literary interpretation comes in at best only as an oracle whose voice is the voice of those who preside over the sanctuary.

The question in such cases is said to depend for answer upon answer to the question whether the power of Congress is exclusive or concurrent, or upon answer to the further question whether the state law amounts to a regulation of commerce or merely incidentally affects it. Some say that the question is whether the state law affects interstate commerce directly or indirectly. In answering such questions the Court is not deciding whether the dictate of the state is one which Congress might have uttered by virtue of its power to "regulate" interstate commerce. Such power of Congress is conceded. The question is whether, notwithstanding the conceded power of Congress, the state may nevertheless do what it has essayed to do. Some would relate this question to language in the constitution by saying that it is a question whether the word "regulate" in the grant to Congress means to regulate exclusively or to regulate concurrently. The Great Expounder of the constitution was attracted to the notion that the word "regulate" connotes not only the full but the exclusive power to lay down the applicable rule. If this notion had been authoritatively embraced, it might have been called the discovery of the constitutional meaning of "regulate." The discovery ultimately made was that in some respects the power of Congress is exclusive and in other respects not. The word "regulate" has two meanings, now one, and now another. It means one thing when applied to interstate railroad rates and another thing when applied to interstate ferry fares. Our literalists may still say that we are finding the meaning of the word when we choose between two alternative meanings and prefer now one and now the other. Here, of course, is the place to quote from Mr. Justice Holmes that "a word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[3] This tells us that

[3]In Towne v. Eisner, (1918) 245 U. S. 418, 435, 38 Sup. Ct. 158, 62 L. Ed. 362.

the way to find the meaning of a word may be to form a judgment about the circumstances and the time when the word is used. When the same word in the same instrument is intermittently given opposite meanings, the time and circumstances leading to the choice are the time and circumstances when the term has to be applied and not when it was used. Time and circumstances are not the authoritative interpreters of the constitution. To different judges they speak with different voices. To say that they speak at all is to indulge in an animism more appropriate to the poet. The judges are the speakers. When they said that over the commerce that admits healthily of diversity of treatment the states have a concurrent power of regulation, they made a choice from considerations of policy, without coercion from the constitution. When they decide in each situation whether the commerce in question is of this character or not, they are again choosing without aid from the constitution and without any clear light from the canon they have formulated to supplement the constitution.

The judicial canon which divided interstate commerce into kinds which the states may and which they may not regulate did not prove adequate for the disposition of all the controversies that arise. State laws bearing upon commerce which had been adjudged to be national in character and over which, therefore, the regulatory power of Congress is deemed to be exclusive, were early seen to be sometimes laws that wisdom should allow to apply until Congress substitutes regulation of its own. So subsidiary canons had to be devised to mark another dichotomy. Over the kind of interstate commerce that is national in character the states are allowed to exercise a control which merely "incidentally affects" that commerce and does not go so far as to "regulate" it. In finding whether a state law "regulates" or merely "incidentally affects," the Court is not probing the meaning of "regulate" as the word is used in the constitution, for that applies only to the power of Congress which concededly exists. A rule sustained as not a regulation when imposed by a state would be sustained as a regulation if imposed by Congress. In determining whether the state law regulates or falls short of regulation, the Court is not defining a term in the constitution but is giving meaning to a phrase in a formula which it has invented to use as a guide where it finds no guide in the constitution. The meaning of the formula does not dictate the decision, but the

decision tends to put meaning into the formula. If the decision is said to depend upon whether the state law affects commerce "directly" or only "indirectly" or "incidentally," we again have the enterprise of applying categories that come from the Court and not from the constitution. To say that we are interpreting language in applying these Court-conceived formulae is to talk in other terms than those of patent fact. The judges differ in applying the formulae, not because they look into different dictionaries, but because they entertain opposing views as to the better choice among the possible judgments open to them.[4]

The discerning reader who has persevered thus far may already suspect that these prolegomena are intended as an apologia for the method of exposition that is to follow. The decisions are to be presented not as the supporting data for black-letter principles but as a succession of particularistic though more or less related judgments. Those who crave the pillow of principles may find rest here and there in the judicial generalities which are quoted. Those with capacity for co-ordination may find material for the exercise of their talents without having to gather it for themselves. Not a few of the cases here reviewed might be put into the compressor of generalization to emerge into compact statements which would tell well enough what the Court has already determined and what it would determine if closely analogous situations were to present themselves in the future. Such compact statements, however, would often serve as little more than points of departure for the advocate or the prophet or the procreator of judgments not yet in esse. Seldom could one escape the enterprise of comparing the specific differences and resemblances between the situation in hand and those that have previously come to judgment. Frequently the decision in cases where the commerce clause is pitted against state police power is said to depend upon all the facts in the case. This renders generalization difficult and may render suspect any story of the controversy that omits minor matters on the assumption that they are insignificant. Courts not infrequently veer away from earlier decisions by treating as essential to them some elements that at the time were not dwelt upon as material.

[4]For general discussions of the commerce clause and state police power, see George C. Lay, "The Commerce Clause of the Constitution—Its History and Development," 60 Am. L. Rev. 161; Luther M. Walter, "Freedom of Interstate and Foreign Commerce," 1 Ala. L. Rev. 57; and Edgar Watkins, "Local State Government as Affected by the Commerce Clause," 98 Cent. L. J. 114.

The problem of arranging such heterogeneous material as all the decisions of a quinquennium on state police power and the commerce clause is not an easy one. To lend added support to the thesis that the material is heterogeneous it might be well to make the decisions draw lots for the order of their appearance. The case for the thesis is good enough, however, without the aid of such sortilege. The chaos will be apparent enough after we have subjected it to all the ordering that we can. The most obvious major grouping that suggests itself is that which separates the decisions on state action in the absence of congressional action from those on state action after Congress has passed laws which may be thought to have occupied the field.

I. State Power in the Absence of Congressional Action

Here again we meet with the problem of classification and grouping. To put the cases in their chronological order would give us the advantage of a principle of precedence that could be applied without debate, but its other merits are less obvious. Something might be said in favor of disposing first of the cases holding that the subject-matter dealt with is not interstate commerce, but this would carry the implication that this issue is dealt with abstractly without reference to the regulation in question and it would not mark the dividing line as vividly as if cases on both sides of it are set in immediate contrast to each other. There is reason to suspect that occasionally the character of the state legislation influences the court in deciding whether its point of contact with the complaining business is at a time when that business is in its interstate-commerce phase or at a time antecedent or subsequent thereto.[5] The line of demarcation between these different phases of an enterprise would seldom have been thought of had not the constitutional division of powers between the nation and the states required it to be marked. A plain business man would customarily deem his manufacture and buying, his solicitation of customers, his sales and his deliveries, an economic unit which would be affected as a whole when pressure is exerted on any part. Disputes in the courts as to the spot on which the pressure immediately impinges have enough in com-

[5]Compare Shafer v. Farmers Grain Co., (1925) 268 U. S. 189, 45 Sup. Ct. 481, 69 L. Ed. 909, noted in 21 Ill. L. Rev. 50 with Lacoste v. Department of Conservation, (1924) 263 U. S. 544, 44 Sup. Ct. 186, 68 L. Ed. 437, noted in 18 Ill. L. Rev. 569 and 22 Mich. L. Rev. 619.

mon so that it seems better to put them together rather than under separate headings derived from the answers judicially given to the questions raised.

Since the two chief branches of interstate commerce are transportation and trade, it might seem desirable to group the cases accordingly. To this there are objections. It is sometimes a matter of dispute whether trade or transportation is the victim of the statute, and the classification would be one of judicial answers rather than of issues. In other cases the validity or invalidity of the state statute may be in no wise affected by the kind of interstate commerce against which it is invoked. It is easy enough to find reasons for rejecting any canon of classification that is suggested. Rigid adherence to any single canon would sometimes part the congruous and join the incongruous. The expedient here adopted is a bifocal one of grouping together some cases on the basis of similarities in the situations involved and others on the basis of the type of regulation in question, and then fitting in the mavericks where they seem to be least lonely. The chief wisdom that such bases of classification can claim is the negative wisdom of not corresponding to lines of judicial doctrine. Their only claim to positive merit is that no competitors seem to be distinctly superior.

Motor vehicles.—Efforts of states to restrict the number of motor busses serving as public carriers by limiting certificates of convenience to the number deemed necessary adequately to serve the territory in question were held unconstitutional in two cases in so far as they excluded bus service exclusively interstate. In *Buck v. Kuykendall*[6] a citizen of Washington who wished to run an automobile stage between Seattle, Washington, and Portland, Oregon, exclusively for through interstate passengers and express had obtained the necessary license from Oregon and had complied with all Washington regulations affecting cars and

[6](1925) 267 U. S. 307, 45 Sup. Ct. 324, 69 L. Ed. 623. See 14 Calif. L. Rev. 58; 25 Colum. L. Rev. 670; 10 Cornell L. Q. 518; 40 Harv. L. Rev. 882; 20 Ill. L. Rev. 309; and 11 Va. L. Reg. n.s. 114. Discussions of the general problem are found in Bernard C. Gavit, "State Highways and Interstate Motor Transportation," 21 Ill. L. Rev. 559; Hugh Gordon, "Preservation of Balance Between Federal and State Powers of Public Utility Regulation," 47 Am. Bar. Ass'n Rep. 661; S. S. Gregory, "Some Phases of Public Utility Law," 45 Am. Bar. Ass'n Rep. 447; Irwin S. Rosenbaum and David E. Lilienthal, "Motor Carrier Regulation; Federal, State and Municipal," 26 Colum. L. Rev. 954; George W. Tooke, "The Centralization of Control of Highway Traffic," 14 Georgetown L. J. 256, reprinted in 60 Am. L. Rev. 741; and notes in 21 Ill. L. Rev. 166; 2 Indiana L. J. 625; and in 9 MINNESOTA LAW REVIEW 572.

drivers generally. He was refused the prescribed Washington certificate of convenience to run his stage, on the ground that there were already four such stages and the Washington law instructed the director of public works to decline to grant further certificates when there is already adequate service. In holding that the plaintiff was entitled to enjoin the enforcement of the prohibition against his line, Mr. Justice Brandeis recognizes that "appropriate state regulations adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the commerce clause, where the indirect burden imposed upon interstate commerce is not unreasonable," but then goes on to say:

"The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines, not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons, while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of federal action—the existence of adequate facilities for conducting interstate commerce. The vice of the legislation is dramatically exposed by the fact that the state of Oregon had issued its certificate which, despite existing facilities, declared that public convenience and necessity required the establishment by Buck of the auto stage line between Seattle and Portland. Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden, but to obstruct, it. Such state action is forbidden by the commerce clause. It also defeats the purpose of Congress, expressed in the legislation giving federal aid for the construction of interstate highways."

In a dissent applicable both to this and to the ensuing case, Mr. Justice McReynolds declares:

"The states have spent enormous sums in constructing roads, and must continue to maintain and protect them at great cost if they are to remain fit for travel.

"The problems arising out of the sudden increase of motor vehicles present extraordinary difficulties. As yet nobody definitely knows what should be done. Manifestly, the exigency cannot be met through uniform rules laid down by Congress.

"Interstate commerce had been greatly aided—amazingly facilitated, indeed—through legislation and expenditures by the states. The challenged statutes do not discriminate against such

commerce, do not seriously impede it, and indicate an honest purpose to promote the best interest of all by preventing unnecessary destruction and keeping the ways fit for maximum service.

"The federal government has not and cannot undertake precise regulation. Control by the states must continue; otherwise chaotic conditions will quickly develop. The problems are essentially local, and should be left with the local authorities unless and until something is done which really tends to obstruct the free flow of commercial intercourse.

"The situation is similar to the one growing out of the necessity for harbor regulations. State statutes concerning pilotage, for example, have been upheld although they amounted to regulation of interstate and foreign commerce. 'They fall within that class of powers which may be exercised by the states until Congress has seen fit to act upon the subject.' "

The only differences between the previous case and *Bush & Sons Co. v. Maloy*[7] are that in the latter the Maryland highway had not been aided by federal funds, and the certificate had been denied by the commission in the exercise of its broad discretion and not under mandate from the statute. These were declared by Mr. Justice Brandeis to be immaterial. The prohibition whether mandatory or discretionary, he says, invades a field reserved for federal regulation, and the significance of the federal aid legislation lies in its indication of the general purpose of Congress that state highways shall be open to interstate commerce.

Another form of state motor-vehicle regulation came before the Court in *Michigan Public Utilities Commission v. Duke*[8] which involved a Michigan statute making common carriers of all persons transporting persons or property for hire by motor ve-

[7](1925) 267 U. S. 317, 45 Sup. Ct. 326, 69 L. Ed. 627.

[8](1925) 266 U. S. 570, 45 Sup. Ct. 191, 69 L. Ed. 445. See 38 Harv. L. Rev. 980 and 34 Yale L. J. 675. The due-process ground of this decision is applied also in Frost v. Railroad Commission, (1926) 271 U. S. 583, 46 Sup. Ct. 605, 70 L. Ed. 1101, noted in 6 Boston Univ. L. Rev. 259; 40 Harv. L. Rev. 131; 21 Ill. L. Rev. 380; and 11 MINNESOTA LAW REVIEW 555. Other cases on the distinction between private and public carriers are considered in 25 Colum. L. Rev. 1081; 23 Mich. L. Rev. 424; 24 Mich. L. Rev. 186; and 74 U. Pa. L. Rev. 849. Discussions of the powers of the states over motor transportation appear in William Chamberlain, "Motor Bus Regulation in Iowa," 9 Iowa L. Rev. 26; W. S. Ingram and M. S. Breckenridge, "Motor Bus Competition With Established Carriers," 9 Iowa L. Rev. 268; David E. Lilienthal and Irwin S. Rosenbaum, "Motor Carrier Regulation by Certificates of Necessity and Convenience," 36 Yale L. J. 163, and "Motor Carrier Regulation in Illinois," 22 Ill. L. Rev. 47; Irwin S. Rosenbaum and David E. Lilienthal, "The Regulation of Motor Car Vehicles in Pennsylvania," 75 U. Pa. L. Rev. 696, and "Motor Car Regulaton in Ohio," 1 U. Cin. L. Rev. 288; and Delos F. Wilcox, "Public Regulation of Motor Bus Service," 116 Ann. Amer. Acad. (No. 205) 107.

hicles in public highways, and thereby subjecting them to the duty to furnish an indemnity bond to secure payment of claims for damage to property carried. The statute also forbade carriage for hire between fixed termini without a certificate of convenience from the utilities commission, and the commission declined to grant the certificate unless the indemnity bond were furnished. The complainant in the case had never held himself out to serve the public, but had confined himself to transporting automobile bodies from Detroit to Toledo under express contracts with manufacturers. In holding that as to such a private carrier, the law and regulations impose an unconstitutional burden on interstate commerce, Mr. Justice Butler declares:

"One bound to furnish transportation to the public as a common carrier must serve all, up to the capacity of his facilities, without discrimination and for reasonable pay. The act would put on plaintiff the duty to use his trucks and other equipment as a common carrier in Michigan, and would prevent him from using them exclusively to perform his contracts. This is to take from him use of instrumentalities by means of which he carries on the interstate commerce in which he is engaged as a private carrier and so directly to burden and interfere with it. . . . And it is a burden upon interstate commerce to impose on plaintiff the onerous duties and strict liability of common carrier, and the obligation of furnishing such indemnity bond to cover the automobile bodies hauled under his contracts as conditions precedent to his right to continue to carry them in interstate commerce. . . . Clearly, these requirements have no relation to public safety or order in the use of motor vehicles upon the highways, or to the collection of compensation for the use of the highways. The police power does not extend so far. It must be held that, if applied to plaintiff and his business, the act would violate the commerce clause of the constitution."

It must remain for the present a matter of guesswork whether the Court would sustain the requirement of the indemnity bond from one who already held himself out to serve all and therefore was concededly a voluntary common carrier.

Where the requirement of a certificate of necessity and convenience is confined to the carriage of intrastate passengers, *Interstate Busses Corporation v. Holyoke Street Railway Co.*[9] holds that the mere fact that the carrying company is engaged also in interstate commerce and using the same conveyances for in-

[9](1927) 273 U. S. 45, 47 Sup. Ct. 298, 71 L. Ed. 319. The decision in the state court is treated in 39 Harv. L. Rev. 900 and 74 U. Pa. L. Rev. 765. On the same issue raised by another case, see 11 MINNESOTA LAW REVIEW 157, 165.

terstate and intrastate passengers does not make the requirement obnoxious to the commerce clause. Mr. Justice Butler keeps the decision within narrow limits by pointing out that there is no showing "'as to the number of persons, if any, travelling in interstate commerce" over the particular portion of the "route competing with the street railway" where the busses were forbidden to carry local passengers, no showing as to what part of the total business is interstate and what part intrastate or that "the two classes of business are so commingled that the separation of one from the other is not reasonably practical or that appellant's interstate passengers may not be carried efficiently and economically in busses used exclusively for that purpose or that appellant's interstate business is dependent in any degree upon the local business in question."

A limitation of the combined load of motor trucks to 16,500 pounds was sustained in *Morris v. Duby*[10] against the complaint that it prevented competition in interstate commerce with the parallel steam railroads. This particular disadvantage to the motor truck, said Mr. Chief Justice Taft, "may possibly be a circumstance to be considered in determining the reasonableness of such a limitation, though that is doubtful, but it is necessarily outweighed when it appears by decision of competent authority that such weight is injurious to the highway for the use of the general public and unduly increases the cost of maintenance and repair." When the highway had been built with federal aid, the state law had permitted a five-ton load. Out of this fact the complainant sought unsuccessfully to spell out an agreement between the state and national governments that bound the state contractually not to reduce the maximum. The congressional legislation had put on the state the primary duty of maintaining the roads after construction, and this was said to leave with the state the power to regulate the method of use, which "cannot be interfered with unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution to bettering the highway systems of the Union and to facilitating the carrying of the mails over them."[11]

[10](1927) 274 U. S. 135, 47 Sup. Ct. 548, 71 L. Ed. 647. On whether a regulation will be held to have an indirect effect on interstate commerce, see 7 Boston Univ. L. Rev. 59.

[11]For the power of the state to make use of the highways by a nonresident motorist equivalent to the appointment of a state official as agent

Gas and electricity.—On February 10, 1919, West Virginia passed a statute requiring that every person furnishing natural gas for public use within the state shall to the extent of his supply of gas produced within the state furnish for public use within the state a supply of natural gas reasonably adequate for the purpose for which such gas is consumed or desired to be consumed within the state. Those with a supply insufficient to comply with the statute were authorized to apply to a state commission for an order directing other domestic producers to furnish them the amount of gas necessary to make up the deficiency in preference to supplying it to other states. Thus West Virginia sought to ensure that West Virginia demands for West Virginia natural gas should be filled before any gas should be furnished to consumers in other states, thereby discriminating against interstate commerce in favor of intrastate commerce. Before the effective date of the Act the Commonwealth of Pennsylvania brought an original proceeding in the United States Supreme Court to enjoin the enforcement of the statute. The

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to accept service of process in actions growing out of such use, see Hess v. Pawloski, (1927) 274 U. S. 352, 47 Sup. Ct. 632, 71 L. Ed. 698, treated in 41 Harv. L. Rev. 94; 31 Law Notes 82; 26 Mich. L. Rev. 201; 7 U. Cin. L. Rev. 486; 76 U. Pa. L. Rev. 93; 4 Wis. L. Rev. 307.

In Clark v. Poor, (1927) 274 U. S. 554, 47 Sup. Ct. 702, 71 L. Ed. 1199, which held that common carriers by motor vehicles, though engaged exclusively in interstate commerce, may be required to pay not only the usual registration fee for motor vehicles but also an additional tax for maintenance and repair of the highways, Mr. Justice Brandeis seemed to imply that if the payment of these taxes were the only prerequisites to the right to get a certificate, the state may require the certificate as a condition precedent to the right to use the highways in interstate commerce. The complainant had sought to enjoin the state commission from enforcing the Act against them. The injunction had been denied by the district court. At that time it had not been conceded by the commission that it could not condition the award of a certificate on the obtaining of a policy of liability and cargo insurance, though this concession was later made. In holding that this initial situation did not require the reversal of the decree denying the injunction, Mr. Justice Brandeis said:

"The plaintiffs did not apply for a certificate or offer to pay the taxes. They refused or failed to do so, not because the insurance was demanded, but because of their belief that, being engaged in interstate commerce, they could not be required to apply for a certificate or to pay the tax. Their claim was unfounded. . . .

"It is not clear whether the liability insurance, for which the act provides, is against loss resulting to third persons from the applicant's negligence in using the highways within the state, or is for loss to passengers resulting from such negligence, or for both purposes. We have no occasion to consider whether under any suggested interpretation, liability insurance, as distinguished from insurance on the interstate cargo, may be required of a carrier engaged wholly in interstate commerce. Compare Hess v. Pawloski, supra. The decree dismissing the bill is affirmed, but without prejudice to the right of the plaintiffs to seek appropriate relief by another suit if they should hereafter be required by the commission to comply with conditions or provisions not warranted by law."

case was argued in December, 1921, reargued in February, 1922, and again in April, 1923. On June 11, 1923, the decision was handed down in *Pennsylvania v. West Virginia*,[12] with a decree declaring the statute invalid and enjoining its enforcement. In dissenting, Mr. Justice Holmes contended that the statute addresses itself to gas thereafter to be collected and applies to such collection before the gas becomes a matter of commerce among the states. He thought that since a state may tax the extraction of ore though the ore is certainly destined to leave the state it may dictate that gas to be produced shall go to local consumers until they are all supplied. He adduces the power of the state to put embargoes on unripe citrus fruits, dead game and water from running streams and says that "if there is any difference between the property rights of the state in game and in gas still in the ground it does not concern the plaintiffs and it is plain from the decisions cited that they do not depend upon a speculative view as to title." He found pertinent analogies in approved statutes requiring natural gas to be supplied to consumers in preference to being used to make carbon black and statutes and orders forbidding manufacture of articles intended for export and requiring interstate trains to stop to accommodate intrastate passengers. Passing to broader grounds, he declares:

"I see nothing in the commerce clause to prevent a state from giving a preference to its inhabitants in the enjoyment of its natural advantages. If the gas were used only by private persons for their own purposes I know of no power in Congress to require them to devote it to public use or to transport it across state lines. It is the law of West Virginia, and of West Virginia alone, that makes the West Virginia gas what is called a public utility, and how far it shall be such is a matter that that law alone decides. I am aware that there is some general language in *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 255, a decision that I thought wrong, implying that Pennsylvania might not keep its coal, or the Northwest its timber, etc. But I confess I do not see what is to hinder. Certainly if the owners of the mines or the forests saw fit not to export their products the

[12](1923) 262 U. S. 553, 43 Sup. Ct. 658, 67 L. Ed. 1117. See 24 Colum. L. Rev. 64; 22 Mich. L. Rev. 138; 72 U. Pa. L. Rev. 278; 10 Va. L. Rev. 233; 9 Va. L. Reg. n.s. 219; and 33 Yale L. J. 185. For earlier discussions of the problem, see Fred O. Blue, "Has the Legislature the Power to Restrict the Sale of the State's Natural Products Into Other States?," 90 Cent. L. J. 154; and Thomas Porter Hardman, "The Right of a State to Restrain the Exportation of Its Products," 26 W. Va. L. Q. 1, 224. An earlier Supreme Court decision frustrating a similar state effort to restrict exportation of gas is considered in 25 Harv. L. Rev. 90; 10 Mich. L. Rev. 135; and 17 Va. L. Reg. 401.

Constitution would not make them do it. I see nothing in that instrument that would produce a different result if the state gave the owners a motive for their conduct, as by offering a bonus. However far the decision in the case referred to goes, it cannot outweigh the consensus of the other decisions to which I have referred and that seem to me to confirm what I should think plain without them, that the Constitution does not prohibit a state from securing a reasonable preference for its own inhabitants in the enjoyment of its products even when the effect of its law is to keep property within its boundaries that otherwise would have passed outside."

Separate dissents by Mr. Justice McReynolds and Mrs. Justice Brandeis confine themselves to the contention that the Court had no jurisdiction of the controversy, though the latter observed that the statement of Mr. Justice Holmes seems to him unanswerable. The answer of the majority of the Court through Mr. Justice Van Devanter is as follows:

"Natural gas is a lawful article of commerce, and its transmission from one state to another for sale and consumption in the latter is interstate commerce. A state law, whether of the state where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs, or burdens such transmission, is a regulation of interstate commerce, a prohibited interference. [Citing cases] The West Virginia Act is such a law. Its provisions and the conditions which must surround its operation are such that it necessarily and directly will compel the diversion to local consumers of a large and increasing part of the gas heretofore and now going to consumers in the complainant states, and therefore will work a serious interference with that commerce."

The answer to alleged special considerations taking the case out of the general rule is that they do not do so. It is true that the business is of a quasi-public character, but it is of the same character also in the consuming states and the Act of the state of production "is in effect an attempt to regulate the interstate business to the advantage of the local consumers," which "she may not do." Even if there is not enough West Virginia gas to meet all demands and if this Act may be regarded as a conservation measure, "it affords no ground for the assumption by the state of power to regulate interstate commerce, which is what the Act attempts to do."[13]

[13]The decree in the principal case is found in Pennsylvania v. West Virginia, (1923) 262 U. S. 623, 43 Sup. Ct. 674, 67 L. Ed. 1143, and on petition for rehearing the decree is affirmed in Pennsylvania v. West Virginia, (1923) 263 U. S. 350, 44 Sup. Ct. 123, 67 L. Ed. 1144.

An order of the Public Service Commission of Pennsylvania requiring a Natural Gas Company to supply gas to a distributing company for the use of local consumers was sustained in *People's Natural Gas Co. v. Public Service Commission*[14] upon approval of the finding of the state court that the order could be complied with by furnishing gas produced in Pennsylvania. In the words of Mr. Justice Van Devanter:

"As respects the Pennsylvania gas we think it must be held to be in intrastate commerce only. Feeding it into the same pipe lines with the West Virginia gas works no change in this respect. Of course after the commingling the two are indistinguishable. But the proportions of both in the mixture are known and that of either readily may be withdrawn without affecting the transportation or sale of the rest. So, for all practicable purposes the two are separable, and neither affects the character of the business as to the other."

The state court had held also that interstate commerce in the gas from West Virginia had ended at the state line where title was taken by the complaining company. In disapproving of this ground of the decision Mr. Justice Van Devanter says:

"As respects the West Virginia gas we are of opinion, in view of its continuous transportation from the places of production in one state to those of consumption in the other and its prompt delivery to purchasers when it reaches the intended destinations, that it must be held to be in interstate commerce throughout these transactions. Prior decisions leave no room for discussion on this point and show that the passing of custody and title at the state boundary without arresting the movement to the destinations intended are minor details which do not affect the essential nature of the business."

Presumably a different problem might arise if various orders of the Pennsylvania Commission should require for their fulfilment a quantity of gas equal to all that acquired from Pennsylvania sources. Would the company then be free to allocate the rest of its gas as it pleased? So far as appears the company in the case at bar did not contend that the order required it to use West Virginia gas because it had allocated to other distribution more than the quantity of gas derived from Pennsylvania. The facts state that the company served Pittsburgh and other Pennsylvania cities and that it acquired two-thirds of its gas from West Virginia sources and one-third from wells in Pennsylvania. There was no suggestion that the company could not get from

[14] (1926) 270 U. S. 550, 46 Sup. Ct. 371, 70 L. Ed. 726.

all sources enough gas to supply all demands. It had for some years furnished gas to the distributing company in question under a contract which it had lawfully terminated. The state commission made its order on the theory that the supplying company was a public service corporation which may be required to feed the distributing company irrespective of any contract between them. The order did not fix the rates but contemplated that rates should be filed by the complainant subject to approval by the commission.

In cases decided in 1919 and 1920 the Supreme Court allowed the state of destination and consumption of natural gas to regulate the rates for service at the jet whether the distributing company buys its supply from a producing company of another state[15] or is itself the producing company in another state.[16] In the former situation the interstate commerce was said to come to an end when the distributing company buys the gas and starts distribution through the local mains. In the second case the interstate commerce was regarded as continuing until the gas reaches the jet, but the service at the jet was said to be something local in its nature which the state of consumption may regulate until Congress undertakes to do so. In *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*[17] a state sought unsuccessfully to regulate the price which a company receiving its supply in uninterrupted transmission from without the state could charge to a distributing company. In denying the power of the receiving state to regulate the wholesale price charged by the supply company to the distributing company, Mr. Justice Sutherland says:

"The contention that, in the public interest, the business is one requiring regulation, need not be challenged. But Congress thus far has not seen fit to regulate it, and its silence, where it has the sole power to speak, is equivalent to a declaration that that particular commerce shall be free from regulation. With the delivery of the gas to the distributing companies, however, the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation. . . . But the sale and deliv-

[15]Public Utilities Commission v. Landon, (1919) 249 U. S. 236, 39 Sup. Ct. 268, 63 L. Ed. 577, discussed in 88 Cent. L. J. 355 and 32 Harv. L. Rev. 860. Another case on a similar point is noted in 3 Calif. L. Rev. 147.

[16]Pennsylvania Gas Co. v. Public Service Commission, (1920) 252 U. S. 23, 40 Sup. Ct. 279, 64 L. Ed. 434, considered in 68 U. Pa. L. Rev. 393; 27 W. Va. L. Q. 180, 201; and 29 Yale L. J. 926.

[17](1924) 265 U. S. 298, 44 Sup. Ct. 544, 68 L. Ed. 1027.

ery here is an inseparable part of a transaction in interstate commerce—not local but essentially national in character—and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve. It is as though the Commission stood at the state line and imposed its regulation upon the final step in the process at the moment the interstate commodity entered the state, and before it had become part of the general mass of property therein."

An effort by the state of origin to regulate the rate for electricity transmitted to another state and there sold to a distributing company met with failure in *Public Utilities Commission v. Attleboro Steam & Electric Co.*[18] This interstate service was being furnished to a single Massachusetts customer under contract rates so low as to be unremunerative, and the loss or lack of adequate return from this contract had to be made up from rates charged by the generating company to local consumers in Rhode Island. To prevent this discrimination against the local Rhode Island consumers, the Rhode Island Commission ordered the raising of the rate for the electricity supplied to the Massachusetts distributing company. This order was reversed by the Rhode Island court and on certiorari this decision was affirmed by the Supreme Court. Mr. Justice Brandeis in dissenting called the problem one essentially local to Rhode Island and said that "to prevent discrimination in the price of electricity wherever used does not obstruct or place a direct burden upon interstate commerce." For the majority Mr. Justice Sanford declared:

"The test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character; and if the regulation places a direct burden upon its interstate business it is none the less beyond the power of the state because this may be the smaller part of its general business. Furthermore, if Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that state, who could have, in the aggregate, an

[18](1927) 273 U. S. 83, 47 Sup. Ct. 294, 71 L. Ed. 309. See 27 Colum. L. Rev. 615; 15 Georgetown L. J. 346; 40 Harv. L. Rev. 906; 22 Ill. L. Rev. 197; 26 Mich. L. Rev. 106; 5 Tex. L. Rev. 318; and 36 Yale L. J. 881.

interest in the interstate rate correlative to that of the customers of the Narragansett Company in Rhode Island. Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either state, but is essentially national in character. The rate is therefore not subject to regulation by either of the two states in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress."[19]

Ferries.—Though at one time the Supreme Court sustained the power of a state to grant an exclusive franchise to run a ferry from its shore to the shore of the adjacent state,[20] it later denied the power of a state to require a license and a fee as a condition prerequisite to running a ferry from Michigan to Canada.[21] It now holds in *Mayor of Vidalia v. McNeely*[22] that a town may not require a license to run an interstate ferry nor unreasonably discriminate between different ferries in designating landing places for them. In the case at bar the district court had found that it was unreasonable to grant to complainant's competitor the exclusive right to land within one hundred and fifty feet on either side of a designated street and had itself designated a distance upstream for the competitor and a distance downstream for the complainant. In affirming this designation Mr. Justice Van Devanter observed that the designation of ferry landings within town limits "is a function which primarily belongs to the town and is not ordinarily subject to judicial control" but here, since the town had proceeded on the theory that no consideration need be given to the complainant and had thereby "plainly deviated from its duty . . . to accord a landing place to one ferry as to the other," it was proper to grant relief in equity. This seems to make the United States Supreme Court the ultimate arbiter as to where interstate ferries shall be allowed to land, and apparently permits as many ferries as private initiative may choose to establish.

[19]Commerce clause questions presented by natural resources or natural forces are dealt with in Alfred Bettman, "Is Giant Power a State or Federal Utility?," 118 Ann. Amer. Acad. (No. 207) 168; Philip P. Wells, "Power and Interstate Commerce," 118 Ann. Amer. Acad. (No. 207) 163; Randall J. LeBoeuf, Jr., "State or Federal Control of the Water Power of Navigable Streams," 15 Georgetown L. J. 201; Frank S. Rowley, "Problems in the Law of Radio Communication," 1 U. Cin. L. Rev. 1; and Edmund F. Trabue, "The Law of Aviation," 58 Am. L. Rev. 65.

[20]Conway v. Taylor, (1862) 1 Black (U.S.) 603, 17 L. Ed. 191.

[21]Sault Ste. Marie v. International Transit Co., (1914) 234 U. S. 333, 34 Sup. Ct. 826, 58 L. Ed. 1337.

[22](1927) 274 U. S. 676, 47 Sup. Ct. 758, 71 L. Ed. 1292.

Trains.—From time to time the Supreme Court has to pass upon the momentous question whether the order of a state commission requiring interstate trains to stop for passengers is an undue interference with interstate commerce or is justified by the local need served by the order. Mountain Grove, Missouri, a town of 2,500 inhabitants, had citizens who felt aggrieved because two interstate trains went by at night without stopping. The state commission ordered that one of these trains be stopped regularly and that the other stop on signal to receive or relinquish passengers beginning or ending journeys of a designated distance. The state court sustained the order and the Supreme Court in *St. Louis-San Francisco R. Co. v. Public Service Commission*[23] reversed the judgment of the state court. Mr. Justice McKenna reviewed some of the precedents, posited the contrast that the state may not regulate this commerce but may affect it, and observed that "there is, however, no inevitable test of the instances; the facts in each case must be considered." Mountain Grove's chief claim to secure this night service seemed to be that it contained a state fruit experimental station and a state poultry experimental station which were visited by 700 persons annually. In consigning these visitors to the necessity of arriving and departing by day, Mr. Justice McKenna observed that "the city has four other through interstate passenger trains, and any deficiency in their schedules or equipment can be corrected without burdening interstate commerce by stopping the trains in question."

It is absurd that such issues still go to the Supreme Court of the United States. Congress might avoid it by vesting the Interstate Commerce Commission with power to approve or condemn the orders of state commissions dealing with such petty details of interstate railroad operation. The precedent of the statute requiring the consent of the secretary of war to the erection of bridges over navigable streams invites emulation.

While statutes requiring trains to slow down or stop at highway crossings have sometimes been declared excessive when applied to interstate trains, Mr. Justice Holmes declares in *Frese v. Chicago, B. & Q. R. Co.*[24] that there is no doubt that a state statute requiring engineers on trains approaching other trains at grade crossings to stop and "positively ascertain that the way is clear and that the train can safely resume its course before pro-

[23](1923) 261 U. S. 369, 43 Sup. Ct. 380, 67 L. Ed. 701.
[24](1923) 263 U. S. 1, 44 Sup. Ct. 1, 67 L. Ed. 505.

ceeding to pass" is properly applicable to interstate trains. Failure of a deceased engineer to comply with the statute defeated the action of his representative under the federal Employers' Liability Law.

The other cases dealing with interstate railroads will be reviewed in a succeeding section on State Police Power After Congressional Action. When the state law is declared inapplicable, it is usually because an Act of Congress or orders of the Interstate Commerce Commission are thought to have occupied the ground. Sometimes it may be assumed that the decision would have been the same even if Congress had not acted. States could not regulate interstate railroad rates even before the power to regulate them was vested in the Interstate Commerce Commission, and so it is likely that the decision in *Baltimore & O. S. W. R. Co. v. Settle*[25] that the shipment in issue was a single interstate one, no part of which could be governed by the local rates, would have been the same if there were no national regulation of interstate rates. Certainly there would be the foundation rule that a state may not regulate interstate rates, though it is possible that in applying the rule the court in the absence of any national prescription, might have leaned toward finding that the interstate journey had ended and an independent local journey had ensued. Indeed it seems probable that the facts of the particular case would have been given a contrary interpretation if it had arisen ten years earlier, for at that time the court did not lean so strongly as it does now in favor of finding that formal interruptions do not break the continuity of an interstate trip.

When a state law is applied in spite of the contention that it is in conflict with a federal rule or that the national government has taken over the field of regulation, the decision of course affords an instance of state power in the absence of national action. *Western & Atlantic R. v. Georgia Public Service Commission*[26] holds that a state commission may order a carrier to continue to furnish service on an industrial siding though eighty-five percent of the traffic over the siding is interstate. In *Lawrence v. St. Louis-San Francisco Ry. Co.*[27] a carrier failed in an effort to enjoin a state commission from making any order restraining it

[25] (1922) 260 U. S. 166, 43 Sup. Ct. 28, 67 L. Ed. 189. See 23 Colum. L. Rev. 308; 36 Harv. L. Rev. 339; and 71 U. Pa. L. Rev. 132. Similar issues are considered in 6 Boston U. L. Rev. 278 and 74 U. Pa. L. Rev. 390.

[26] (1925) 267 U. S. 493, 46 Sup. Ct. 409, 69 L. Ed. 753.

[27] (1927) 274 U. S. 588, 47 Sup. Ct. 720, 71 L. Ed. 1219.

from changing the location of its shops or its division point, but the case holds no more than that an injunction should not issue. "To require that the regulating body of the state be advised of a proposed change seriously affecting transportation conditions is not," says Mr. Justice Brandeis, "such an obvious interference with interstate commerce that, on application for a preliminary injunction, the Act should lightly be assumed to be beyond the power of the state." The power of the Interstate Commerce Commission to regulate intrastate rates in order to preserve the proper relationship between them and interstate rates does not, when unexercised, holds *Arkansas Railroad Commission v. Chicago, R. I. & P. R. Co.*,[28] prevent a state commission from ordering a reduction of intrastate rates; but, as appears from *Chicago, M. & St. P. Ry. Co. v. Public Service Commission*[29] a state may not adduce the profitableness of interstate rates in order to sustain intrastate rates concededly confiscatory when considered independently.

(To be Continued.)

[28](1927) 274 U. S. 597, 47 Sup. Ct. 724, 71 L. Ed. 1224.
[29](1927) 274 U. S. 344, 47 Sup. Ct. 604, 71 L. Ed. 695.